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No. 94-961

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

STATE OF DELAWARE,
Petitioner,

v.

ROBERT W. JACKSON, III,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE
STATE OF DELAWARE

RESPONDENT'S BRIEF IN OPPOSITION

Date: December 20, 1994

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Respondent, Robert W. Jackson, III, asks this Court to deny the State of Delaware's petition. In its opinion of July 15, 1994, the Delaware Supreme Court ruled that respondent's Sixth Amendment right to counsel was violated by the introduction into evidence at his penalty hearing of taped telephone conversations between the respondent and a former cell-mate turned State's informant. Additionally, the Court considered it improper for the trial judge to consider the content of those conversations as he weighed the aggravating and mitigating circumstances applicable to this respondent. Because that conclusion is consistent with the prior decisions of this Court, review here is not warranted.

OPINION BELOW

The Opinion of the Delaware Supreme Court is now officially reported at 643 A.2d 1360 (Del. 1994) and is reproduced in the Appendix to the Petition for Certiorari at pages 1 through 52.

REASON FOR DENYING THE PETITION

THE DECISION BELOW WAS CONSISTENT WITH THE PRIOR OPINIONS OF THIS COURT.

The question presented in this case is precisely the question addressed by this Court in the case of Maine v. Moulton, 474 U.S. 159 (1985); that is, whether a criminal defendant's Sixth Amendment right to the assistance of counsel is violated by the admission at trial of incriminating statements made by him and deliberately elicited by a secret government informant after indictment. The Delaware Supreme Court, applying this Court's holding in Moulton, determined that the use of a secret State agent to deliberately elicit incriminating statements from the respondent after indictment was offensive to the Sixth Amendment. (App. 20-35). The Delaware Supreme Court further determined that the admission and consideration of those statements by the trial judge was not harmless beyond a reasonable doubt. Accordingly, respondent's death sentences were vacated and a new sentencing hearing was ordered. (App. 40).

The State of Delaware unsuccessfully argued below that there was no Sixth Amendment violation since respondent's right to counsel had not attached as to any plot to kill a State's witness. (App. 26). The State of Delaware now argues that the decision below is inconsistent with a proper reading of the Sixth Amendment right to counsel. It is respondent's contention that both this Court in its decision in Maine v. Moulton and the

Delaware Supreme Court in its decision below properly defined the role of counsel under the Sixth Amendment and determined that the rights of the respondent under the Sixth Amendment had been violated.

In Massiah v. United States, 377 U.S. 201, 206 (1964), this Court held that a defendant is denied the basic protection of the Sixth Amendment, guaranteeing the defendant's right to the assistance of counsel, when government agents "deliberately elicit" incriminating statements from him after he has been indicted and in the absence of his attorney. The Sixth Amendment right to counsel is viewed by this Court as "indispensable to the fair administration of our adversarial system of criminal justice", Moulton, 474 U.S. at 168-69, and exists to insure that the accused is not "left irretrievably to his own devices without legal help when the heavy artillery of prosecutorial power is brought to bear." United States v. Nocella, 849 F.2d 33 (1st Cir. 1988) [citing Moran v. Burbine, 475 U.S. 412, 430 (1986)]. Recognizing that the right to counsel is shaped by the need for assistance of counsel, the Court has found that the protections of the Sixth Amendment apply not only at trial but at "earlier, 'critical' stages in the criminal justice process, where the results might well settle the accused's fate and reduce the trial itself to a mere formality." Moulton, 474 U.S. at 170 (citations omitted).

Once the right to counsel has attached, the government is under an "affirmative obligation" to respect and preserve the accused's choice to seek this assistance, and the law enforcement authorities must take no action that "circumvents, and thereby dilutes the protection afforded by the right to counsel." Moulton, 474 U.S. at 171. The Sixth Amendment protections apply equally to a coercive interrogation of a suspect held in

custody, Michigan v. Jackson, 475 U.S. 625 (1986), and to an "indirect and surreptitious interrogation" made possible through the use of informants. Massiah v. United States, supra, (excluding incriminating statements which a defendant, who was not in custody, made to a co-defendant who was cooperating with government agents in their continuing investigation of defendant's suspected narcotics activity). See also United States v. Henry, 447 U.S. 264 (1980) (excluding incriminating statement which defendant made to a jail-house informant who had engaged defendant in conversations about his pending bank robbery charges). The United States Supreme Court made clear in Henry that the government violates a defendant's Sixth Amendment right "[b]y intentionally creating a situation likely to induce [an accused] to make incriminating statements without the assistance of counsel." Henry, 447 U.S. at 274. This rule applies even where the government expressly instructs its informant not to initiate any conversations with the accused and not to question him regarding the pending charges. Moulton, 474 U.S. at 173-74. In such cases, the government's "knowing exploitation . . . of an opportunity to confront the accused without counsel being present is as much a breach of [its] obligation not to circumvent the right to the assistance of counsel as is the intentional creation of such an opportunity." Moulton, 474 U.S. at 176.

Thus, regardless of who initiates the conversation, the Sixth Amendment is violated whenever a government informant actively engages a defendant in conversation that is likely to elicit incriminating statements about the defendant's upcoming trial. Although the Sixth Amendment is not violated whenever - "by luck or happenstance" - the government obtains incriminating statements from the accused after the right to counsel has attached, any

participation by a government informant "beyond merely listening" becomes the "functional equivalent of direct police interrogation." Kuhlmann v. Wilson, 477 U.S. 436, 459 (1986), citing United States v. Henry, supra, 477 U.S. at 277. By concealing the fact that the informant is a government agent, the police deny an accused the right to rely on counsel as a "medium" between himself and the government, a right guaranteed by the Sixth Amendment. Moulton, 474 U.S. at 176.

Although incriminating statements pertaining to pending charges obtained in violation of the Sixth Amendment may not be introduced at the trial of those charges, this Court has emphasized that "[i]ncriminating statements pertaining to other crimes, as to which the Sixth Amendment right has not yet attached are, of course, admissible at a trial of those offenses." Moulton, 474 U.S. at 180. See also McNeill v. Wisconsin, 111 S.Ct. 2204 (1991). As this Court has reasoned, "to exclude evidence pertaining to charges as to which the Sixth Amendment right had not attached at the time the evidence was obtained, simply because other charges were pending at the time, would unnecessarily frustrate the public's interest in the investigation of criminal activity." Moulton, 474 U.S. at 180. The Sixth Amendment is not to be interpreted as a cloak of immunity for a defendant during the pendency of an indictment. See Hoffa v. United States, 385 U.S. 293, 307-08 (1966), reh'g denied, 386 U.S. 940 (1966).

In applying the above precedents, the Delaware Supreme Court answered three questions with respect to the respondent: (1) had the respondent's right to counsel attached? (2) if so, was the informant a State agent? and (3) if a State agent, did the government informant deliberately elicit incriminating statements from the respondent? (App. 26).

There can be no dispute that the incriminating statements at issue were taken after the respondent's Sixth Amendment rights had attached with respect to the Girardi murder. The Delaware Supreme Court determined that, since the incriminating statements obtained from the respondent were, in fact, used against him during the sentencing phase of the Girardi murder trial, his right to counsel with respect to those statements had attached. (App. 27-29). The Delaware Supreme Court found the Fourth Circuit's decision in United States v. Kidd, 12 F.3d 30 (4th Cir. 1993), cert. denied 114 S.Ct. 1629 (1994) "unpersuasive" in analyzing whether or not the respondent's Sixth Amendment rights had attached, and declined to follow that decision.

In its petition for certiorari, the State of Delaware has placed heavy reliance upon the Fourth Circuit's opinion in Kidd. It is important to note that the Kidd decision was rendered in the context of what is appropriate for a sentencing court to consider in the "Relevant Conduct" section of a presentence report prepared pursuant to the Federal Sentencing Guidelines. Those guidelines provide that "[w]hen any factor important to the sentencing determination is reasonably in dispute, the parties shall be given an adequate opportunity to present information to the court regarding that factor." The guidelines further provide that "the court may consider relevant information without regard to its admissibility under the rules of evidence applicable at trial" in resolving any reasonable dispute concerning a factor important to the sentencing determination. United States Sentencing Commission, Guidelines Manual, §6(a)1.3 (Nov. 1992). In determining the relevant facts, sentencing judges are not restricted to information that would be inadmissible at trial. 18 U.S.C. §3661. Furthermore, "a court has almost unfettered discretion in determining what

information it will hear and rely upon in sentencing deliberations." United States v. Baylin, 535 F.Supp. 1145, 1151 (D.Del. 1982), and "the court may consider illegally obtained evidence." Id.

On the other hand, in the context of the penalty phase of a capital murder trial, this Court has consistently held that "the State is not relieved of the obligation to observe fundamental constitutional guarantees." Estelle v. Smith, 451 U.S. 454, 463 (1981) (holding statements taken in violation of a capital defendant's Fifth and Sixth Amendment rights were inadmissible at penalty hearing where the State offered such evidence to demonstrate future dangerousness of the defendant.) In its opinion below, the Delaware Supreme Court recognized that "the Eighth Amendment requires increased reliability of the process by which capital punishment may be imposed." [App. 32, citing Herrera v. Collins, ___ U.S. ___, 113 S.Ct. 853, 863 (1993)].

The Delaware Supreme Court also concluded that, when he recorded his telephone conversation with the respondent, the government informant in this case was acting as a State agent. (App. 33-35). The State of Delaware does not challenge that determination in its Petition for Writ of Certiorari. See State's Petition at p.12, n.11.

Finally, the Delaware Supreme Court properly determined that the government informant deliberately elicited incriminating statements from the respondent during these taped telephone conversations. (App. 35).

All of these findings of fact were amply supported by the record.

Having failed to persuade the Delaware Supreme Court that the Sixth Amendment had not attached when the respondent was secretly tape recorded by the State's agent just

prior to and during his trial for the Girardi murder, the State of Delaware now seeks to convince this Court that, since there was no "proper" role for counsel to play, there was no interference with the respondent's right to counsel respect to his pending charges relating to the Girardi murder. (State's petition at p.9). The State's argument, in essence, is that, since the statements used against the respondent at trial were related to his attempt to eliminate a State witness, counsel could play no "legitimate role" in assisting his client in such matters. In fact, the State argues, it would be unethical and illegal for a lawyer to provide counsel with respect to the plotting of a murder of a State's witness. (See State's petition at pp.10-11). It is the State's apparent argument that, where a criminal defendant plans to engage in conduct which is illegal, a lawyer could neither legally nor ethically provide advice.

The State of Delaware's argument fails because this same set of circumstances was before the Court in Moulton. In Moulton, the State had surreptitiously tape recorded conversations between the defendant (Moulton) and his co-defendant (Colson). During those conversations Moulton not only mentioned the possibility of eliminating certain State's witnesses, but had also discussed the development of a false alibi at trial. The trial court determined that all of these statements were admissible; nonetheless, the State only offered "one portion of the discussion about developing false testimony." Moulton, 474 U.S. at 167. Clearly, the development of false testimony is illegal conduct. Under the State's argument, counsel could have played no legitimate role in providing advice under these circumstances; however, this Court determined otherwise. Under the State's logic, if police officers had come to respondent's cell and asked him about whether he had plans to

eliminate a State witness, such an interrogation would not violate the proscriptions of the Sixth Amendment. Clearly, such conduct would violate respondent's Sixth Amendment rights if the officers intended to utilize information gleaned from this interrogation against the respondent in the prosecution of offenses for which the respondent was under indictment and had asserted his Sixth Amendment right to speak only through counsel. The State of Delaware, by it's petition for writ of certiorari, is asking the Court to overturn the line of cases which began with the Massiah decision and logically developed through the holding in Moulton.

State and federal courts have consistently applied this correct interpretation of the Sixth Amendment since the rendering of the Moulton decision. Since there is no dispute between the states or the various federal circuit courts in the interpretation and application of Massiah, Moulton or their progeny, there simply is no reason for this Court to revisit this line of authority in the context of this case.

CONCLUSION

For the above reasons, the respondent, Robert W. Jackson, III, asks the Court to deny the State of Delaware's Petition for Writ of Certiorari.

Date: December 20, 1994

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CERTIFICATE OF SERVICE

STATE OF DELAWARE :
:SS
COUNTY OF NEW CASTLE:

BE IT REMEMBERED that on this 20th day of December, 1994, personally appeared before me, a Notary Public for the State and County aforesaid, Kevin J. O'Connell, counsel of record for the respondent in the above-captioned case, who being by me duly sworn did depose and state as follows:

1. That he caused to be hand delivered one copy of respondent's Brief in Opposition in the above-captioned case to Charles Oberly, Esquire, Attorney General, Richard E. Fairbanks, Jr., Deputy Attorney General, and Loren C. Meyers, Esquire, Deputy Attorney General, care of the Department of Justice, Carvel State Office Building, 820 North French Street, 8th Floor, Wilmington, Delaware 19801.

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SWORN TO AND SUBSCRIBED before me the day and year aforesaid.

Julia P. Reilly
Notary Public
My Commission Expires: April 30, 1997